rents of Pang Hua and they corroborated the evidence of the defendant that Pang is the child of the deceased and that she gave birth to him. Indeed these entries show that DW3 and DW4 are not Pang Hua's parents. It would certainly need more than mere assertions by the plaintiff and her witnesses to disprove that Pang Hua is not the child of the deceased and the defendant.

Let me now consider the argument that the defendant was past child-bearing age when she purportedly gave birth to Pang Hua. The entry in the defendant's identity card shows she was born in 1916 making her 52 years old in 1968 when she purportedly gave birth to Pang Hua. She, however, said the date shown in the identity card is not correct because 'during those days we did not have birth certificate – we tell orally.' She said she was 45 years old when she gave birth to Pang Hua. The birth certificate of Pang Hua as stated earlier shows the defendant's age as 42 years. I find nothing improbable about wrong dates of birth been given in identity cards of persons born in the earlier decades of this century as a result of a lack of legislation governing registration of births and deaths in these earlier days; in Kelantan, legislation was introduced only in 1930 (see Kelantan Enactment No 6 of 1930, now repealed) for the registration of births and deaths. I find that she was not beyond 45, she was more probably 42 as indicated in the certificate of birth of Pang Hua, in 1968, well within the child-bearing age of a woman.

Defence counsel also argued that the deceased was impotent and sterile. True, the deceased had no child from the first wife. But the first wife could have had child bearing problems. On the other hand, the further argument was that even with the second wife he had no child until the defendant purportedly gave him a child in 1968. According to the evidence of the defendant, she married the deceased 'about two years after the war' and that would have meant that if she gave birth to Pang Hua in 1968 that it was well after 20 years of marriage before the deceased had a child. There, however, could have been a multitude of medical and other reasons in relation to the deceased and the defendant as to why the defendant did not conceive earlier and I am not prepared to make an inference that he was impotent or sterile merely because he had no issue earlier on from his two marriages.

That brings me to the argument, this time, of defence counsel. He says once it is accepted by the court that the defendant gave birth to Pang Hua then the presumption in s 112 of the Evidence Act 1950 should be invoked that since the birth was during the marriage of the deceased and the defendant it is conclusive that the child is the child of the deceased and that the only way of disproving that is to show that the defendant and the deceased had no access to each other. With respect, the argument of counsel is misconceived. The issue is not one of the legitimacy of the child, whether the child was born in or out of wedlock but whether the child was the issue of one set of lawfully wedded parents or another set of lawfully wedded parents and therefore the provisions of s 112 of the Evidence Act are not applicable in this case.

Before I conclude, I would like to comment on the manner in which the defendant reacted to a question whether she knew Mek Nab, PW2. It was obvious she knew Mek Nab but she denied knowing her. At first I thought that because the defendant's eyesight was very poor (this was observable in court), she meant she did not recognize Mek Nab but when she was asked to identity Mek Nab at close quarters she said she had not seen her for a long time and she insisted she did not know 'Mek Nab'. I had a distinct impression of her intense dislike for 'Mek Nab' and that was why she reacted petulantly and denied knowing her. I do not consider this incident as detracting from the probability of her evidence relating to her giving birth to Pang Hua and that the deceased was the father of the boy.

To conclude. The plaintiff's pleads that Pang Hua is not the son of the deceased and that he is the grandson of the defendant and step grandson of the deceased. And all that she did by way of evidence was to produce will-o'-the-wisp allegations. And these in the face of the unshaken evidence of the defendant that she gave birth to Pang Hua, that the deceased was the father of Pang Hua supported by Pang Hua's certificate of birth containing entries to that effect. And these in the face of evidence of the alleged parents of Pang Hua, DW3 and DW4, that they were not Pang Hua's parents. Accordingly, the case of the plaintiff fails and I dismiss the claim with costs.

Claim dismissed.

Solicitors: *Wan Mustapa & Co; Rithaudeen & Aziz.*

Reported by *Teo Keang Sood*

Collings Hui Sdn Bhd v United Estate Projects Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D3-22-331-87
VC GEORGE J
28 JANUARY 1988

Civil Procedure – Ex parte interlocutory injunction – Setting aside of – Whether case so overwhelming that court could dispose of issues and grant injunction summarily – Whether breach of contract – Whether cause of action in tort – Balance of convenience – Loss of reputation – Whether parties can be compensated in damages

The first defendant ('UEP') is the developer of a project known as the Subang Jaya Shopping Centre ('the centre') at Subang

Jaya Selangor. Apparently the centre would have some 500,000 sq ft of floor space available for letting. UEP entered into an agreement with the plaintiffs appointing them their sole letting agents in respect of the centre but reserving the right for themselves to seek tenants and the right to decide whether tenants found by the plaintiffs were acceptable as tenants. The plaintiffs were to be paid commission in respect of tenancies or lettings that were found by them and which were acceptable to UEP. The appointment was for the fixed period of one year from 1 April 1987. In or about June 1987, UEP entered into an agreement with the second defendant Natvest whereby Natvest were appointed managers to take over and manage the business of the first defendant in respect of the centre 'in a proper and businesslike manner'. The 'business' of UEP was defined to specifically include, inter alia, procuring suitable tenants for the centre. The plaintiffs were informed of the same, and given assurance that Natvest would recognize the plaintiffs' position as sole marketing agents in respect of the letting of the centre. However, the plaintiffs were distressed to find that Natvest, apparently aided by the Lion Group of Companies of which Natvest is a member, were actively marketing the lettable space available in the centre. On 16 December 1987, the plaintiffs caused the writ herein to issue against UEP and Natvest. By the writ they seek an injunction restraining Natvest from marketing space in the centre 'until trial of the action or further order', damages and costs and for 'further or other relief'. On 17 December 1987, the plaintiffs obtained an interlocutory injunction restraining Natvest from holding themselves out as having the authority to market space in the centre and from marketing such space until trial of the action or further order. On 24 December 1987, Natvest took out the present application to set aside the ex parte order.

Held, allowing the application: (1) The case clearly calls for consideration at a full trial of the issues.

(2) The plaintiffs can be compensated in damages if any has been suffered or will be suffered and which, as has been seen, the plaintiffs themselves have estimated and which can in any event be easily assessed. Accordingly there is no need to consider the question of balance of convenience. In any event the plaintiffs' contract ends on 31 March 1988 and on that count alone the balance of convenience would be in favour of the defendants.

(3) The ex parte order is set aside. Plaintiffs to pay costs of this application.

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] 1 All ER 504 (refd)
2 *Cayne & Anor* v *Global Natural Resources plc* [1984] 1 All ER 225 (refd)
3 *Foaminol Laboratories Ltd* v *British Artid Plastics Ltd* [1941] 2 All ER 393 (refd)
4 *Aerial Advertising Co* v *Batchelors Peas Ltd (Manchester)* [1938] 2 All ER 788 (refd)
5 *High Mark (M) Sdn Bhd* v *Pacto Malaysia Sdn Bhd* [1987] 2 MLJ 85 (not folld)

S Sockanathan for the plaintiffs/respondents.
Wong Chong Wah for the second defendant/applicant.
R Lazar for the first defendant.

Cur Adv Vult

VC George J: The first defendant ('UEP') is the developer of a project known as the Subang Jaya Shopping Centre ('the centre') at Subang Jaya Selangor. Apparently the centre would have some 500,000 sq ft of floor space available for letting. UEP entered into an agreement with the plaintiffs appointing them their sole letting agent in respect of the centre but reserving the right for themselves to seek tenants. UEP also reserved the right to decide whether tenants found by the plaintiffs were acceptable as tenants. The plaintiffs were to be paid commission in respect of tenancies or lettings that were found by them and which were acceptable to UEP. The appointment was made on 1 April 1987 and was for the fixed period of one year from that date.

In or about June 1987, UEP entered into an agreement with the second defendant Natvest whereby Natvest were appointed managers to take over and manage the business of the first defendant in respect of the centre 'in a proper and businesslike manner'. The 'business' of UEP was defined to specifically include, inter alia, procuring suitable tenants for the centre, collecting rentals and deposits, employing staff to maintain the complex and the paying of service charges. By a letter dated 10 July 1987 (exh KY-8 to encl (2)), UEP informed the plaintiffs of the appointment of Natvest as managers. The plaintiffs recognized Natvest as the manager but sought an assurance from UEP by a letter dated 15 July 1987 (KY-11 to (2)) that Natvest would recognize the plaintiffs' position as sole marketing agent in respect of lettings in respect of the centre. That assurance was given by UEP's letter of 12 August 1987 (KY-13 to (2)) to Lions Enterprise (KL) Sdn Bhd who apparently controlled or was an associate company of Natvest.

However, the plaintiffs were distressed to find that Natvest, apparently aided by what is known as the Lion Group of Companies of which Natvest is a member, were actively marketing the lettable space available in the centre. The plaintiffs take the view that if UEP had allowed Natvest to do so, UEP was in breach of the contract appointing the plaintiffs as sole letting agent. The plaintiffs also contend that they have a cause of action in tort against Natvest, the basis of which is the plaintiffs' contention that it was Natvest that had induced UEP to commit the said breach of the contract they have with the plaintiffs. Natvest, on the other hand, take the view that by the management agreement they have with UEP, in effect they have stepped into the shoes of UEP vis-à-vis the centre, and since UEP is entitled by the terms of their appointment of the plaintiffs as sole letting agent to themselves seek out tenants for space at the centre, Natvest as managers of UEP were equally entitled to do so and their being permitted to do so by UEP does not amount to a breach of the contract UEP has with the plaintiffs.

On 16 December 1987, the plaintiffs caused the writ herein to issue against UEP and Natvest. By the writ they seek an injunction restraining Natvest from marketing

space in the centre 'until trial of the action or further order', damages and costs and for 'further or other relief'.

On 17 December 1987, counsel for the plaintiffs appeared before the vacation judge, Gunn Chit Tuan J, on an ex parte application for an interlocutory injunction restraining Natvest from holding themselves out as having the authority to market space in the centre and from marketing such space until trial of the action or further order. The ex parte order was granted.

Thereafter the writ as well as the order granting the interlocutory injunction were served on the defendants whereupon on 24 December 1987, Natvest took out the present application to set aside the ex parte order. As the court vacation was over the matter was placed before me.

One of the contentions before me of Encik Sockanathan, counsel for the plaintiffs, is that the plaintiffs' case is so overwhelming that the court could dispose of the issue of whether to grant an injunction pending trial in a summary manner as it were. Certainly where the plaintiffs' case is so open and shut that any trial of the issues would simply be a formality, I agree that the court need not apply *American Cyanamid*[1] but can grant the injunction sought without further ado. In *Cayne & Anor* v *Global Natural Resources plc*,[2] May LJ put it in this way at p 238f:

> There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional.

In the instant case, is the plaintiffs' case against one or the other or both of the defendants so open and shut as to fall within that principle? I think not. It is unarguable that UEP was and is perfectly entitled in spite of the sole letting agency given to the plaintiffs to solicit tenants for the centre. In the premises whether the manager appointed by UEP is entitled to all that UEP is entitled to do is not a question that may summarily be disposed of. In any event even if the case of the plaintiffs in respect of breach of contract on the part of UEP is open and shut (which I do not think it is), the case against Natvest is in tort on facts and law that clearly calls for consideration at a full trial of the issues.

Accordingly *American Cyanamid*[1] has to be called in aid.

There is no question that there are serious questions to be tried. The question on which I think this application turns is whether damages would not be an adequate remedy.

The plaintiffs themselves by their writ only seek damages. Their contract with UEP was only for one year, which period expires on 31 March 1988 and in the affidavit in support of the application for the injunction the quantum of damages has been estimated at 'about $1 million' (see para 39 of encl (20)). Encik Sockanathan argued that on top of that the plaintiffs suffered and will suffer what he calls loss of reputation. This cannot be a head of damages unless pecuniary loss can be proved (see *McGregor on Damages*, 14th Ed, p 51, para 74; *Foaminol Laboratories Ltd* v *British Artid Plastics Ltd*[3] at pp 399 and 400, *Aerial Advertising Co* v *Batchelors Peas Ltd (Manchester)*[4] at p 796. The plaintiffs do not say that they can prove pecuniary loss as a result of loss of reputation because it is obvious that they would not be able to do so. As to *High Mark (M) Sdn Bhd* v *Pacto Malaysia Sdn Bhd*[5] where the court appears to have been influenced by the contention of the plaintiff who was an engineering consultant that it would suffer 'incalculable loss' by losing credibility with other consultants, I have with great respect to conclude that the point was not fully argued and that in any event the decision finally turned on balance of convenience. The observations made on social discredit in relation to adequacy of damages made in that case must be considered to have been made per incuriam.

In my judgment in the instant case the plaintiffs can be compensated in damages if any has been suffered or will be suffered and which, as has been seen, the plaintiffs themselves have estimated and which can in any event be easily assessed. That the plaintiffs have spent money on advertisement and extra staff and had put in effort and time into the project does not change the position. Accordingly there is no need for me to consider the question of balance of convenience. In any event the plaintiffs' contract ends on 31 March 1988 and on that count alone the balance of convenience would be in favour of the defendants.

The ex parte order given on 17 December 1987 is set aside. The plaintiffs will pay the costs of this application.

Order accordingly.

Solicitors: *Chooi & Co*; *Skrine & Co*; *Shearn Delamore & Co.*

Reported by *Wong Kim Fatt*